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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of:

INSITE TOWERS DEVELOPMENT, LLC,

COMPLAINANT,

V.

DIXIE-ESCALANTE RURAL ELECTRIC  
ASSOCIATION, INC.,

RESPONDENT.

Docket No. 15-066-

**COMPLAINT, REQUEST  
FOR DECLARATORY  
AND INJUNCTIVE RELIEF  
AND REQUEST FOR  
AGENCY ACTION**

Pursuant to Utah Code Ann. § 63G-4-201 and Utah Admin. Code § R746-100-3.A, InSite Towers Development, LLC (“InSite”) submits its Complaint and Request for Declaratory and Injunctive Relief and Request for Agency Action, seeking relief from the refusal of Dixie-Escalante Rural Electric Association, Inc., dba Dixie Power, to provide InSite with electric service at just and reasonable rates at a site within Dixie Power’s service territory in Washington County, Utah.

## FACTS

1. InSite is a Delaware limited liability company, registered in good standing to

conduct business in Utah.

2. InSite is a wholly owned subsidiary of InSite Wireless Group, which owns, operates and manages more than 1,200 wireless communication tower sites in the United States, Puerto Rico, the U.S. Virgin Islands and Canada.

3. Dixie Power is a Utah corporation and a public utility subject to the regulation of the Utah Public Service Commission ("Commission") pursuant to Utah Code Ann., Title 54.

4. Dixie Power holds Certificate of Public Convenience and Necessity No. 1930 issued by the Commission to provide electric service to customers, *inter alia*, in portions of Washington County, Utah, including Parcel 7516-A (located west of Dixie Drive and north of Cisco Drive) (the "Parcel"). (Exhibit 1.)

5. InSite plans to erect a monopole telecommunications tower ("InSite Tower") on a portion of the Parcel in order to provide broad-area service to telecommunications carriers such as Verizon Wireless.

6. The Parcel is owned by Velda and Orwin Gubler (the "Gublers").

7. InSite has leased a portion of the Parcel from the Gublers on which to erect the InSite Tower.

8. In preparation for constructing and operating the InSite Tower, InSite obtained a conditional use permit from the Washington County Planning Commission on January 22, 2014, valid for one year. The Planning Commission has approved an extension of InSite's permit to January 22, 2015.

9. InSite has obtained approval from the Federal Aviation Administration for a 110-foot tower located on the Parcel. The approval will expire August 15, 2015, but may

be renewed under certain circumstances.

10. InSite has completed, through its contractor Terracon Consultants, Inc. ("Terracon"), a NEPA Land Use Compliance Report and NEPA Checklist for Proposed Monopole Telecommunications Tower Site.

11. InSite has also completed, through Terracon, a Phase I Environmental Site Assessment for the Tower.

12. InSite will require one 600-amp meter panel service for initial operation of the InSite Tower. It will require a second 600-amp meter panel service at a later date as demand for InSite's telecommunication services increases.

13. In April 2014 and again in August 2014, InSite contacted the City of St. George ("the City") to explore the possibility of obtaining electric service for the Tower Site and was ultimately informed by letter from the City's counsel on September 8, 2014, that the City would only supply electric service to the Tower Site if the entirety of the Gublers' Parcel were annexed into the City.

14. As owners of the Parcel, the Gublers are unwilling to seek annexation of their property into the City.

15. InSite has only a leasehold interest in a small portion of the Parcel and has no ability to comply with the City's annexation condition for obtaining service.

16. InSite filed a formal application for electric service with the City on February 2, 2015. The application has been denied by the City.

17. The City cites Utah Code Ann. § 10-8-14, enacted by the 2013 Utah Legislature, as authority to deny service to InSite:

(3)(a) Except as provided in Subsection (3)(b), (5), or (9), a municipality may not sell or deliver the electricity produced or distributed by its electric works

constructed, maintained, or operated in accordance with Subsection (1) to a retail customer located beyond its municipal boundary.

18. Utah Code Ann. §§ 10-8-14(3)(b) and (9) do not apply to the current situation facing InSite.

19. Utah Code Ann. § 10-8-14(5) is available to the City to provide the requested service to InSite, although it is not required under the statute to do so:

(a) A municipality may submit to the electrical corporation a request to provide electric service to an electric customer described in Subsection (4)(b).

(b) If a municipality submits a request, the electrical corporation shall respond to the request within 60 days.

(c) If the electrical corporation agrees to allow the municipality to provide electric service to the customer:

(i) the electrical corporation and the municipality shall enter into a written agreement;

(ii) the municipality shall agree in the written agreement to subsequently transfer service to the customer described in Subsection (4)(b) if the electrical corporation notifies, in writing, the municipality that the electrical corporation has installed a facility capable of providing electric service to the customer; and

(iii) the municipality may provide the service if:

(A) except as provided in Subsection (5)(c)(iii)(B), the Public Service Commission approves the agreement in accordance with Section 54-4-40; or

(B) for an electrical cooperative that meets the requirements of Subsection 54-7-12(7), the governing board of the electrical cooperative approves the agreement.

20. The City has declined to proceed under Utah Code Ann. § 10-8-14(5)(a).

21. With the City's final refusal to proceed under Utah Code Ann. § 10-8-14(5)(a), InSite has exhausted its administrative remedies in seeking to obtain electric service to the Tower Site from the City.

22. In March 2014, InSite contacted Dixie Power, seeking electric service from Dixie Power for the Tower Site.

23. Dixie Power declined to provide such service, claiming that the Tower Site is not in its certificated service area.

24. As authority for its refusal to provide service to InSite, Dixie Power has cited a February 1981 Agreement between Dixie Power and the City ("1981 Agreement"), under which Dixie Power purported to sell to the City certain electric generation facilities located near the Parcel and agreed that Dixie Power:

[W]ill not oppose or object to the construction, maintenance and operation of such electrical transmission and distribution facilities upon and across those territories included in the certificate of convenience and necessity issued by the Utah Public Service Commission as may be reasonable and necessary to deliver electric energy to any part of the City of St. George and to those power generating and water treatment facilities located outside of the City of St. George but comprising a part of or reasonably related to the development, operation and activities of the reservoir and power generating facility commonly known as the Warner Valley project.

(Exhibit 2.<sup>1</sup>)

25. Dixie Power has asserted that it does not now have the authority or the obligation to provide electric service to the area that includes the Tower Site.

26. There is no record in the Public Service Commission's files that Dixie Power communicated with the Commission about the 1981 Agreement in any respect, much less that it sought authority to engage in the transactions provided in the Agreement.

27. The Commission did not authorize Dixie Power, operating as a public utility, to abandon or otherwise dispose of facilities that it employed to provide electric service in its certificated area, which included the Parcel on the Gublers' property.

28. The Commission did not authorize Dixie Power, operating as a public utility, to abandon or discontinue its service obligation to provide electric service in the area containing the Parcel for which it held and currently holds Certificate of Public Convenience and Necessity No. 1930.

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<sup>1</sup>The copy of the 1981 Agreement available to InSite is the result several generations of copying. A more readable transcript of the text of the Agreement is also included.

29. Dixie Power has indicated that, if it were to provide electric service to the InSite Tower, it would need to install connecting facilities from its existing facilities, and that InSite would be required to pay for all such new transmission and ancillary facilities and related rights of way necessary to connect to the Tower Site.

30. InSite understands Dixie Power's existing facilities nearest to the Tower Site are relatively remote. Paying all costs to connect Dixie Power's existing facilities to the Tower Site would make the InSite Tower project prohibitively uneconomic. InSite would be forced to abandon its Tower Site project under such a financial burden.

31. Dixie Power could install stand-alone generation equipment on or near the Tower Site to provide the electric service required by InSite at the Tower Site (see ¶ 12 above) and which would not require the installation of facilities and incursion of costs necessary to connect to Dixie Power's existing facilities. The possibilities for such an installation include a diesel- or natural gas-driven generator. In effect, Dixie Power would be able to restore its ability to provide service at that point in a manner similar to its ability to provide the electric service that it abandoned under the terms of the 1981 Agreement without Commission authorization.

## **REQUESTS FOR RELIEF**

### **COUNT I – DECLARATORY RELIEF**

32. Under the 1981 Agreement, Dixie Power, without authorization of the Commission, unlawfully abandoned or otherwise disposed of facilities it owned and operated as a public utility, in violation of the provisions of Utah Code Ann., Title 54, Chapter 3.

33. Under the 1981 Agreement, Dixie Power, without authorization of the Commission, unlawfully abandoned or otherwise has refused to provide electric service at

just and reasonable rates in the certificated area in which the Tower Site is located, in violation of the provisions of Utah Code Ann., Title 54, Chapter 3.

34. Dixie Power's unlawful abandonment or other disposal of public utility facilities and its refusal to provide electric service to a retail customer under the 1981 Agreement without Commission authorization is not in the public interest.

35. InSite is entitled to a Commission order declaring that:

(a) Dixie Power's abandonment or other disposal of certain facilities of its electric plant, as defined in Utah Code Ann. § 54-2-1(8), required the approval of the Commission;

(b) Dixie Power did not obtain the approval required in ¶ 35(a) above;

(c) Dixie Power's abandonment of, or its refusal to provide, electric service at the Tower Site located in the area covered by Dixie Power's Certificate of Convenience and Necessity No. 1930 required the approval of the Commission;

(d) Dixie Power did not obtain the approval required in ¶ 35(c) above;

(e) Dixie Power's Certificate of Convenience and Necessity No. 1930 and its general obligations under Utah Code Ann., Title 54, Chapter 3, require Dixie Power to provide service to InSite at the Tower Site under conditions and at rates that are just and reasonable under Utah Code Ann. § 54-3-1; and

(f) Installing and charging InSite for the full costs of facilities to connect the Tower Site with Dixie Power's existing electric plant facilities under Dixie Power's current Electric Service Regulations on file with the Commission would result in rates that would be neither just nor reasonable under Utah Code Ann. § 54-3-1.

## **COUNT II – INJUNCTIVE RELIEF**

36. Because of Dixie Power's unlawful abandonment of certain electric plant facilities used to provide electric service in the area containing the Tower Site, InSite cannot obtain the electric service necessary to construct and operate the telecommunications tower to be built on the Tower Site.

37. InSite should be placed in the same position of receiving electric service at just and reasonable rates as it would be in if Dixie Power had not unlawfully abandoned or transferred its facilities and obligations to provide such service to InSite.

38. Dixie Power has the ability to do this by obtaining access to or installing facilities at or near that Tower Site that would be suitable to provide the service needed by InSite to construct and operate its telecommunications business.

39. For the reasons and facts set forth in ¶¶ 1-38 and pursuant to the declarations sought by InSite in ¶ 35, InSite requests that the Commission order injunctive relief as follows:

(a) Require Dixie Power to place InSite in the same position for receiving electric service at just and reasonable rates as it would be in if Dixie Power had not unlawfully abandoned or transferred its facilities and obligations to provide such service.

(b) Require Dixie Power to provide electric service to InSite at the Tower Site under its Certificate of Convenience and Necessity No. 1930 and at the Small Commercial Service (50kW) Maximum) rate currently on file with the Commission.

(c) Enjoin Dixie Power from imposing on InSite the Construction Advance charges set forth in Dixie Power's Regulation No. 10, Line Extension Policy, currently on



file with the Commission,<sup>2</sup> or imposing any other charge for installation of facilities as a condition for providing electric service to the Tower Site.

#### REQUEST FOR EXPEDITED PROCEEDINGS

40. Because Dixie Power has refused to provide electric service to the Tower Site at just and reasonable rates, InSite is suffering and will continue to suffer irreparable injury from its inability to proceed with construction and operation of its telecommunications project, to the detriment of its owners, direct customers, sublessees and the general public.

41. InSite's conditional use permit from Washington County will expire if work is not commenced within a reasonable time prior to the deadline of January 1, 2016.

42. InSite's Federal Aviation Administration approval expires August 15, 2015, although it may, at the discretion of FAA, be subject to renewal.

43. If InSite cannot commence work on the Subject Property within a reasonable period of time, the Washington County zoning approval applicable to the Tower Site is subject to revocation.

44. InSite's principal anchor tenant, Verizon Wireless, may declare default on InSite's commitment to furnish telecommunication facilities on the Tower Site, which would render the InSite Tower project infeasible.

45. The Tower Site project will provide wireless coverage to areas not currently covered, thus enhancing wireless coverage to individuals, as well as public convenience and safety. Delays in obtaining appropriate electric service accordingly affects public safety during the period of delay.

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<sup>2</sup><http://www.psc.utah.gov/utilities/electric/11docs/11066To1/70518Dixie%20Escalante-%20Rural%20Electric%20Association,%20Inc,%2011-To1.pdf> (last visited Apr. 2, 2015).

46. It is therefore important that InSite obtain appropriate assurance of the availability of electric service at the Tower Site as soon as practicable.

**PRAYER FOR RELIEF**

PURSUANT TO the facts and reasons stated above, InSite Towers Development, LLC, respectfully requests that the Utah Public Service Commission enter an order:

1. Providing the declaratory relief set forth in ¶¶ 35(a) - 35(f) above;
2. Providing injunctive relief as set forth in ¶¶ 39(a) - 39(c) above;
3. Setting a schedule for further proceedings on an expedited basis so that the extensive and expensive preparatory efforts that have been made to date by InSite do not become out of date, stale, revoked or otherwise inapplicable to the InSite Tower project, with the attendant economic losses to InSite, its customers and the public interest in efficient telecommunications facilities in the Washington County area.

Respectfully submitted this 1<sup>st</sup> day of April 2015,

JONES, WALDO, HOLBROOK & McDONOUGH, P.C.



Gary G. Sackett  
Vince C. Rampton

*Attorneys for InSite Towers Development, LLC*

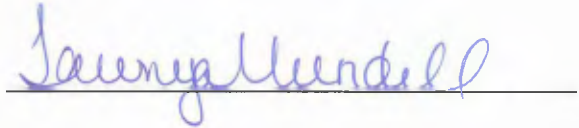
Exhibit 1: InSite Project Site Plan  
Exhibit 2: 1981 Agreement between  
Dixie-Escalante Rural Electric  
Association and City of  
St. George

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**CERTIFICATE OF SERVICE**

I certify that I have served on the following persons a true and correct copy of the foregoing COMPLAINT AND REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF AND REQUEST FOR AGENCY ACTION by U.S. Mail and e-mail this 7 day of April 2015.

  
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**RESPONDENT:**

LaDel Laub, Registered Agent  
Dixie-Escalante Rural Electric Association, Inc.  
71 East Highway 56  
Beryl, UT 84714  
(By Certified Mail)

**UTAH DIVISION OF PUBLIC UTILITIES:**

Patricia E. Schmid  
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Salt Lake City, UT 84111  
brentcoleman@utah.gov

# EXHIBIT 1







## **EXHIBIT 2**

# AGREEMENT

FOR and in consideration of the mutual covenants herein contained, and other good and valuable consideration, Dixie-Escalante Rural Electric Association, a Utah corporation, and the City of St. George, a municipal corporation of the State of Utah, do hereby agree as follows:

1. The City of St. George gives Dixie-Escalante R.E.A. a non-exclusive franchise to provide energy in certain areas of the City for a period of twenty years, as referred to in City Ordinance No. 1980-12.
2. Dixie-Escalante R.E.A. transfers and delivers title to the City of all its existing utility poles, wires and other electrical transmission equipment and distribution system and facilities now located north of the Virgin River and north of the Bloomington North property line and within the City of St. George, with the exception of 69KV transmission line and all system transformers.
3. Dixie-Escalante R.E.A. will dismiss with prejudice those lawsuits filed in the Fifth Judicial District Court, Washington County, Utah, and designated as civil suits 5571 and 5876.
4. Dixie-Escalante R.E.A. will not oppose or object to the construction, maintenance and operation of such electrical transmission and distribution facilities upon and across those territories included in the certificate of convenience and necessity issued by the Utah Public Service Commission as may be reasonable and necessary to deliver electrical energy to any part of the City of St. George and to those power generating and water treatment facilities located outside of the City of St. George but comprising a part of or reasonably related to the development operation and activities of the reservoir and power generating facility commonly known as the Warner Valley project. Prior to the construction of the facilities contemplated in this paragraph the City shall consult and confer with Dixie-Escalante R.E.A. in order to promote mutual cooperation between the parties.
5. The City of St. George shall pay to Dixie-Escalante R.E.A. the sum of Sixty-Five Thousand Dollars (\$65,000) as consideration for the system and facilities referred to in Paragraph 2, above.

In witness whereof, the parties have hereunto set their hands as of February 7, 1981.

CITY OF ST. GEORGE

BY

James G. Larkin  
James G. Larkin, Mayor

DIXIE-ESCALANTE R.E.A.

BY

Richard B. Shurtliff  
Richard B. Shurtliff, Chairman

## AGREEMENT

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1. The City of St. George gives Dixie-Escalante R.E.A. a non-exclusive franchise to provide energy in certain areas of the City for a period of twenty years, as referred to in City Ordinance No. 1908-12.
2. Dixie-Escalante REA transfers and delivers title to the City of all its existing utility poles, wires and other electrical transmission equipment and distribution system and facilities now located north of the Virgin River and north of the Bloomington North property line and within the City of St. George, with the exception of the 69KV transmission line and all system transformers.
3. Dixie-Escalante R.E.A. will dismiss with prejudice those lawsuits filed in the Fifth Judicial District Court, Washington County, Utah, and designated as civil suits 5571 and 5876.
4. Dixie-Escalante REA will not oppose or object to the construction, maintenance and operation of such electrical transmission and distribution facilities upon and across those territories included in the certificate of convenience and necessity issued by the Utah Public Service Commission as may be reasonable and necessary to deliver electrical energy to any part of the City of St. George and to those power generating and water treatment facilities located outside of the City of St. George, but compromising a part of or reasonably related to the development, operation and activities of the reservoir and power generating facility commonly known as the Warner Valley project. Prior to the construction of the facilities contemplated in this paragraph, the City shall consult and confer with Dixie-Escalante REA in order to promote mutual cooperation between the parties.
5. The City of St. George shall pay to Dixie-Escalante R.E.A. the sum of Sixty-Five Thousand Dollars (\$65,000) as consideration for the system and facilities referred to in Paragraph 2, above.

In witness whereof, the parties have hereunto set their hands as of  
February 1, 1981.

CITY OF ST. GEORGE

DIXIE-ESCALANTE R.E.A.

By James G. Larkin  
James G. Larkin, Mayor

By Richard B. Shurtliff  
Richard B. Shurtliff, Chairman